

ORIGINAL

DOCKET FILE COPY ORIGINAL

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
PAUL J. FELDMAN
FRANK R. JAZZO
ANDREW S. KERSTING
EUGENE M. LAWSON, JR.
SUSAN A. MARSHALL*
HARRY C. MARTIN
RAYMOND J. QUIANZON
LEONARD R. RAISH
JAMES P. RILEY
ALISON J. SHAPIRO
KATHLEEN VICTORY
JENNIFER DINE WAGNER*
HOWARD M. WEISS
ZHAO XIAOHUA*

* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

RETIRED MEMBERS
RICHARD HILDRETH
GEORGE PETRUTSAS

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
DONALD J. EVANS*
MITCHELL LAZARUS
EDWARD S. O'NEILL*

WRITER'S DIRECT

RECEIVED

JAN 19 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 19, 2001

703-812-0438

bavender@fhh-telcomlaw.com

VIA HAND DELIVERY

Magalie Roman Salas, Esq.

Secretary

Federal Communications Commission

445 12th Street, S.W., Room TW-B204

Washington, DC 20554

Re: MM Docket No. 98-93
Petition For Reconsideration

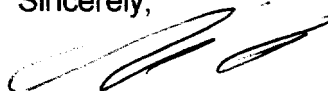
Dear Ms. Salas:

Transmitted herewith are an original and four copies of a Petition For Reconsideration in the above-referenced rulemaking proceeding.

Attached is a copy of the filing with the notation "Please stamp and return to Fletcher, Heald & Hildreth." Please stamp the copy and return it to the courier.

If questions arise, please contact the undersigned attorney.

Sincerely,



Ann Bavender
Counsel for American Educational
Broadcasting, Inc.

Enclosure

Number of Copies rec'd
A B C D E

014

RECEIVED

JAN 19 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

1998 BIENNIAL REGULATORY REVIEW--
STREAMLINING OF RADIO TECHNICAL
RULES IN PARTS 73 AND 74 OF THE
COMMISSION'S RULES

)
)
)
)
)
)
)

MM Dkt. 98-93

To: Federal Communications Commission

PETITION FOR RECONSIDERATION

American Educational Broadcasting, Inc. ("American"), by its attorneys, hereby petitions for reconsideration of that portion of the Commission's Second Report And Order, released November 1, 2000, in the above-captioned rulemaking proceeding ("Order"), which applied to all applications pending as of the release date of the Order the new rule adopted in the Order requiring noncommercial FM stations operating on reserved channels to provide predicted 60 dBu signals to at least 50% of their communities of license or reach 50% of the population within the communities. Such retroactive application of the new rule is unfair to those applicants which applied for new stations several years ago, long before the Commission proposed to adopt the new rule, and would have had their applications granted long ago if the Commission had not delayed in processing the non-mutually exclusive applications or adopting and

implementing a procedure for choosing among the mutually exclusive applications.¹ In support of this petition, the following is stated:

American currently has pending applications for new noncommercial FM stations proposing operation in the reserved band.² Some of the applications did not propose coverage of the city of license as there was no requirement to do so, nor had such a requirement been proposed by the Commission³, when the applications were filed. While some of the applications can be amended to comply with the new city of license coverage rule, at least three of the applications cannot be so amended due to shortspacing constraints.⁴ Application of the new rule to such applications would lead to an unjust result as such applications were filed at a time when the Commission's rules specifically stated that city of license coverage was not required⁵ and the Commission routinely granted applications which did not propose city of license coverage.⁶

¹See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Dkt. No. 95-31.

²American's principals currently operate and hold interests in noncommercial FM stations in the reserved band and/or previously have done so.

³The NPRM in this proceeding was not released until June 15, 1998.

⁴File No. BPED-970626MF, San Joaquin, California; File No. BPED-970417ME, Temple, Texas; File No. BPED-960712MA, Tucson, Arizona.

⁵The Note which previously followed Section 73.315(a) of the rules specified that city of license coverage requirements "do not apply to noncommercial educational FM broadcast stations operating on reserved channels."

⁶See e.g. BLED-19880323KB, granted October 15, 1991, WWFR(FM), Okeechobee, Florida; File No. BPED-940531MB, granted March 10, 1995 and File No. BMPED-960708MB, granted May 7, 1997, WMFL(FM), Florida City, Florida; File No. BPED-940531MA, granted

The unjustness of applying the new city of license rule to applications pending at the time the rule was adopted is particularly egregious since many of those applications remain pending solely due to the failure of the Commission to adopt procedures for choosing among mutually exclusive applications. The Commission recently adopted such procedures in *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Dkt. No. 95-31. However, the docket's predecessor, GC Dkt. 92-52, addressing both commercial and noncommercial applications, was initiated in 1992, the order addressing noncommercial applications was not released until April 21, 2000, petitions for reconsideration of that order remain pending, and processing of mutually exclusive noncommercial applications has yet to recommence after a several year hiatus. Most of the mutually exclusive applications pending at the time the new rule was adopted would have been granted years ago, or dismissed after competing applications were granted, if the Commission had put in place procedures for processing and granting such applications.

The unjustness of applying the new city of license rule to applications pending at the time the rule was adopted is most egregious when the rule is applied to pending non-mutually exclusive applications that the Commission's staff failed to process promptly prior to the new rule's adoption. For instance, American's application for a new noncommercial FM station at San Joaquin, California, File No. BPED-970626MF, has been grantable for over two years and the Commission's staff has yet to grant it despite numerous requests by American for action on the application. When the

December 10, 1996 and File No. BMPED-970910MD, granted June 9, 2000, WBGY(FM), Naples, Florida.

application was filed in June 1997 it was mutually exclusive with other applications. American amended the application on December 13, 1998 to eliminate the mutual exclusivity. On numerous occasions thereafter, American requested that the Commission grant the application. On July 6, 1999, a senior member of the Mass Media Bureau's Audio Services Division staff advised that the application would be granted in approximately one month. When that didn't happen, the staff later stated that the application was being held pending action in this proceeding. However, since the Commission's rules did not then require city of license coverage and the Commission had not frozen action on applications not proposing such coverage while this proceeding was pending, the staff was not authorized to keep the application pending for that reason.

The staff was particularly not authorized to keep the application pending as the Audio Services Division had previously ruled, in response to pleadings filed by American in connection with the application, that American need not demonstrate that the proposed station would provide coverage to its city of license. In a routine processing letter dated July 8, 1998, the Audio Services Division staff had requested that American demonstrate within 30 days that it would provide such coverage. In response, American advised that such coverage was not possible and, alternatively, submitted an amendment proposing a new city of license to which it could provide coverage. In a petition for acceptance of the amendment, American showed that it would be unjust to suddenly begin requiring such coverage when the Commission's rules specifically stated that such coverage was not required and American had filed the application with the knowledge that the Commission had routinely granted other

applications, including some previously filed by American's principals, without requiring such coverage. In a letter ruling, dated October 19, 1998, the Audio Services Division returned the amendment and stated "based upon the arguments raised in the Petition for Acceptance of Amendment, we hereby rescind the staff's request that [American] submit a map demonstrating 60 dBu coverage of San Joaquin." Since the Audio Services Division ruled in 1998 that American need not demonstrate coverage of the application's city of license and then failed to promptly process the application once American had eliminated all mutually exclusivity with competing applications, it would be particularly egregious to now apply the new city of license coverage to the application.

In light of the unfairness in applying the new rule to applications pending at the time the rule was adopted, American requests that the Commission apply the new rule only prospectively, to applications filed after the Order was released. Alternatively, American requests that the Commission allow those applications which cannot be amended to propose coverage of their current cities of license to be amended to propose a different city of license to which coverage can be provided, without the amendments being considered "major amendments" pursuant to the Commission's

rules or the applications being assigned new file numbers, made subject to new competing applications, or losing their places in the processing line.

Respectfully submitted,

American Educational Broadcasting, Inc.

By: 

Ann Bavender

Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
(703) 812-0400

Its Attorney

January 19, 2001